In The Supreme Court Of The United States

OCTOBER TERM, 1976

No. 76-414

RICHARD KILCULLEN, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION

JOHN M. HARRINGTON, JR.
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100
Attorney for the Petitioner

Of Counsel:

JOHN SILAS HOPKINS, III
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

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We regret the necessity of filing this reply brief but certain matters require further comment.

1. The opinion of the court of appeals was belatedly released for publication in mid-November, 1976, and will therefore be a published, rather than unpublished, decision.

2. The Government's brief wholly ignores the ground on which the Petition is based — the conflict between circuits and with a plurality opinion of this Court on whether an error in charging on one of the essential elements of the offense constitutes plain error. We know of only two possible grounds of opposition to such a Petition: (1) that there is no true conflict or (2) that the conflict is not im-

portant enough to warrant this Court's plenary consideration.[1] The Government asserts neither.[2]

The fact is that the decision of the court of appeals creates a serious conflict of circuits — a conflict rendered all the more serious by the belated release of the decision for publication. And it is hard to imagine a more important or fundamental conflict. The jury was misinstructed on one of the elements of the offense. The defendant may have been convicted without any finding that he committed an offense. Certainly no right is more fundamental than the right not to go to prison when one has committed no crime. And a conflict in circuits over whether one must take formal ex-

[1] A third argument might be that the decision of the court of appeals was correct; but we have never seen any semblance of such an argument and know of no support for it.

[2] The Government asserts that "the trial judge carefully instructed the jury on the essential elements of the crime and emphasized that each element had to be proven beyond a reasonable doubt" and then quotes the portion of the charge in which the judge recited the four elements of the offense in the words of the statute. (Br. Opp. 4-5) In a cryptic footnote the Government then purports to dispose of the entire conflict on which the Petition is based by asserting that the cases that are in conflict are all ones "in which the jury was not charged at all or was charged wholly incorrectly about an essential element of the crime." (Br. Opp. 5 n.3) In the very next paragraph of text, however, the Government concedes that the trial judge charged that the essential element of forgery would be satisfied if the payee was fictitious and his endorsement was therefore a forgery. If the Government's point is that the average lay juror, having been told that the statute covers only a "forged" check, would have known from experience that under *Streett* v. *United States*, 331 F.2d 151, 153-57 (8th Cir. 1964), and cases following it the judge's charge as to forgery of the endorsement was incorrect and should not be followed, then the Government's argument is fanciful. If the Government's point is something else then it is so recondite as to escape us altogether.

ception to the jury charge in order to preserve that right is a conflict as fundamental to our system of justice as any that could exist.

3. Most of the Government's brief is devoted to arguing that the error in the charge was harmless. Indeed, the Government goes so far as to assert that the court of appeals "properly rejected" the petitioner's argument that the charge was erroneous on the ground that there was "virtually no likelihood" that the verdict rested solely on the forged endorsement charge.[3] (Br. Opp. 5-6) Although the court did say that there was "more than ample evidence" on the two alternative ways of proving forgery (Pet. App. 15-16), the fact is that the court "[did] not reach either [of the petitioner's] contention[s as to error in the charge], however, because Kilcullen neither objected to the challenged instruction nor requested his own instructions, Fed. R. Crim. P. 30, and we do not find plain error. Fed. R. Crim. P. 52(b)."

Nowhere did the court consider or hold that the error was harmless beyond reasonable doubt (the applicable standard) or cite Fed. R. Crim. P. 52(*a*), the rule on harm-

[3] This assertion may be based in part on a misreading of the record. Thus, the Government asserts (Br. Opp. 2 n. 2) that Mr. Bannon turned state's evidence during the trial and testified for the prosecution against his codefendants under a grant of immunity. The implication is that Mr. Bannon had evidence damaging enough to the petitioner to justify a grant of immunity. The Government has its facts wrong. No one turned state's evidence. The fact is that the prosecution chose to grant limited use immunity to Mr. Street, not Mr. Bannon, and to compel his testimony. Since he had been convicted previously, the grant did not affect his prosecution and in no way constituted a trade of immunity for testimony that the prosecution considered valuable enough to warrant it.

less error. The court simply refused to consider the petitioner's attack on a vital element of the charge because trial counsel had taken no exception.

Respectfully submitted,

JOHN M. HARRINGTON, JR.
ROPES & GRAY
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6100

Attorney for the Petitioner

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